87-1446

No.

In The

Supreme Court of the United States

October Term, 1987

JOSEPH LOMBARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether a man indicted in substantive counts as an accessory can be convicted vicariously thereof as a principal? (Or can a man aid and abet himself?)

II.

Whether an aiding and abetting instruction must be limited to the substantive crimes to avoid vicarious attribution of substantive guilt to one who aids and abets a conspiracy but is not a member thereof, where imposition of vicarious liability is sought pursuant to a conspiratorial principal-agent theory?

III.

Whether an indictment under the Travel Act, 18 U.S.C. §1952 which fails to plead facts essential to the commission of the offense is sufficient if merely stated in the words of the statute?

PARTIES TO PROCEEDINGS BELOW

In the proceedings below, *United States v. Cerone, et al*, 830 F.2d 938 (8 Cir., 1987) United States of America was appellee and John Cerone, Milton Rockman, Joseph Aiuppa, Angelo LaPietra, and Joseph Lombardo, the petitioner herein, appellants.

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Petitioner Joseph Lombardo prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming his conviction of substantive violations of using interstate facilities in aid of racketeering enterprises in violation of 18 U.S.C. Sec. 1952, and conspiring to do so in violation of 18 U.S.C. Sec. 371.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Eighth Circuit, consolidated numbers 86-1439 to 1443, is reported in 830 F. 2d 938 (8 Cir., 1987) and is set out as Appendix A.

JURISDICTIONAL STATEMENT

On October 8, 1987 the Court of Appeals for the Eighth Circuit filed its opinion (App. A). The last denial of a Petition for Rehearing was entered on December 23, 1987. This petition is timely filed within 60 days thereof. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and court rule 20.1.

STATUTES INVOLVED

Tit. 18, U.S.C. Sec. 2(a)

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

18 U.S.C., Sec. 550 (Repealed, 1951)

Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

18 U.S.C. Sec. 371

If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each [shall be punished].

18 U.S.C. Sec. 1952

(a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce . . . with intent to –

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion . . . [etc.] of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in paragraphs (1), (2), and (3) shall be [punished].

(b) . . . "unlawful activity" means (1) any business enterprise involving gambling . . . offenses . . . in violation of the laws of the State in which they are committed or of the United States.

(c) * * *

STATEMENT OF THE CASE

Nature of the Case

Petitioner Joseph Lombardo and fourteen others were indicted under 18 U.S.C., Sections 1952 and 371 (set forth in relevant part above). All were substantively charged in seven counts with the use of interstate facilities for the purpose of unlawfully engaging in a gambling enterprise in violation of the laws of Nevada, in violation of 18 U.S.C. Sec. 1952 and in a separate count, with conspiring to violate Sec. 1952 in violation of 18 U.S.C. Sec. 371.

Of the five defendants whose trials went to a jury verdict, all were convicted of all counts. Petitioner Lombardo was sentenced to consecutive sentences of 2 years on each count, or 16 years, and to pay a substantial fine.

Jurisdiction of the Trial Court

Jurisdiction was lodged in the trial court under 18 U.S.C. Sec. 3231, giving jurisdiction for offenses against the United States, the charges against the defendants being such offenses.

STATEMENT OF FACTS

Because this petition addresses technical matters independent of the facts, we limit our statement to an overview, resolving all disputed matters of fact in favor of the government.

All defendants were charged in counts 2 - 8 of an eight count indictment with use of interstate facilities for unlawful purposes, viz., a gambling enterprise in violation of the law of Nevada, per 18 U.S.C. Sec. 1952. Count 1 charged all with conspiring to violate Sec. 1952 per 18 U.S.C. Sec. 371. Details footnoted in the opinion below (see App. 9a, n.5-6) adequately limn out the charges save for failure to recite allegation of the "thereafter acts", required by Sec. 1952. Each substantive count charged the principal with the interstate use (telephone or travel), charged in the language of the statute, and that he thereafter performed acts "to promote, manage, establish [etc.] . . . the unlawful activity" (condemned by the statute). None of such acts was specific as to date, place, nature of such act, or other persons involved therein.

For the purposes of this petition, the government may be said to have proven that the defendants were parties to a loose but far-flung criminal association reaching into the Teamster union coffers and steering loans thence to third persons to buy Las Vegas gambling businesses. Thereby the defendants became secret owners of such businesses in (violation of Nevada law) which enable them unlawfully to strip cash from the *de jure* owners. Petitioner's role related to manipulation of the affairs of Teamsters officials to facilitate the enterprise.

The court below accepted our contention that the evidence failed to prove aiding and abetting (App. 9a). Indeed, none was offered, the case being submitted to the jury on the theory that defendants charged as accessories were vicariously liable for the acts of defendants named as principals in the substantive counts, per *Pinkerton v. United*

States, 328 U.S. 640 (1946). Despite the absence of evidence of aiding and abetting the substantive violations, over objection the jury was also given an aiding and abetting charge (Instructions 80 and 81, Tr. 76-77, January 16, 1986) which was not limited to the substantive counts.

REASONS FOR GRANTING THE WRIT

I.

The allegations of the indictment charging petitioner as an aider and abettor in the commission of the substantive counts, forbade their submission to the jury on the theory that he was a principal.

Jurisprudential soundness lies in logical consistency as the hand lies in the fist. Each entails the other. The theory of criminal liability upon which this case was sent to the jury was contradicted by the theory of criminal liability set forth in the indictment.

Here, in each of seven substantive counts, one defendant was named as principal, the remainder as accessories (aiders and abettors). No evidence of aiding and abetting was adduced as to any defendant. The case was submitted to the jury on the theory that the substantive violations were the objects of a broad conspiracy of which the defendants were members, per the conspiratorial object theory enunciated in *Pinkerton v. United States*, 328 U.S. 640 (1946).

In *Pinkerton*, defendant Daniel Pinkerton had entered a moonshine whiskey conspiracy with his brother. Daniel was thereafter imprisoned in an unrelated matter, and while in prison his co-conspirator brother committed an offense in furtherance of their earlier conspiracy. Daniel was indicted and convicted of the conspiracy and the substantive offense.

In affirming, the court reasoned that since each conspirator is the agent of all conspirators, each, in his reciprocal capacity as principal bears vicarious guilt for substantive violations committed by a co-conspirator *cum* agent acting in furtherance of the conspiracy. Accordingly, conspirators may be found guilty of substantive violations of which they stand indicted on bare proof that a co-conspirator indicted in the same substantive count com-

mitted the offense. *Pinkerton* simply grafted the doctrine of *respondeat superior* onto the criminal law via conspiracy.

We do not contend that *repondeat superior* is unavailable as a theory of criminal law. But the criminality imputed cannot differ in kind from the criminality of which the defendant stands charged. A man charged in a substantive count as an accessory cannot be found guilty thereof as a principal. The fact that his guilt is to be imposed vicariously *a la* the doctrine of *Pinkerton* does not change the general rule. Not only does *Pinkerton* not require that result; it does not permit it if the *caveat* implicit in *Pinkerton* is given effect. ("[Pinkerton] was not indicted as an aider and abettor . . . nor was his case submitted to the jury on that theory." *Pinkerton*, p.646, n.6)

Petitioner was substantively indicted as an aider and abettor, that is, as accessory. Yet the substantive criminality imputed to him via conspiratorial membership was as to each such count the criminality of a co-conspirator indicted in the same count as principal felon. Necessarily the liability to be imputed was that of a principal felon, because the principal felon does not aid and abet. Hence the criminality of the principal felon, imputed to another, cannot be that of an accessory, but of principal felon only. Thus on an agency theory the jury could not find petitioner guilty "in manner and form as charged in the indictment", but only in manner and form as *not* charged, i.e., as a principal.

We perceive the skeleton of our contentions thus:

1. A principal is vicariously liable for the acts of his agent.

2. As to each other, conspirators are related as principal to agent.

3. Hence each conspirator is liable for his agent-co-conspirator's crimes (the *Pinkerton* doctrine).

4. One indicted as a principal felon may properly be

found guilty as an accessory (e.g., *United States v. Good Shield*, 544 F.2d 950, 952 (8 Cir., 1976)

5. One indicted as accessory cannot be found guilty as principal felon (settled law for 400 years, e.g., 1 Hale P.C. 625).

6. Petitioner was indicted substantively as an accessory (aider and abettor).

7. Liability to be imputed to him per *Pinkerton* was that of a co-conspirator named and acting as a substantive principal felon.

8. But liability as a principal felon cannot be imputed to one named as an accessory (# 5, above).

9. Hence *Pinkerton* is inapplicable to conspirators substantively indicted as accessories, where the liability sought to be imputed to them is that of principal felon.

Our contentions are systematically consistent with the logic of the law of principal and accessory. Permitting conviction as a principal felon of one indicted as an accessory leads to contradiction and paradox, hallmarks of logical inconsistency and jurisprudential unsoundness.

Tit. 18, U.S.C. Sec. 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

18 U.S.C. Sec. 2 is in the very words of the common law, even to their proper common law sequence. It is implausible to suppose the Congress adopted the words of the common law but not the *meaning* of those words and the law incident to that meaning. Thus the common law within which those meanings have unique significance persists (1 Story, *Const.* 563-564, 1 Kent 341) unless expressly altered.

The law of principal and accessory is much neglected over the past few decades. The quest for authority

inevitably turns to Judge Hand's opinion in *United States v. Peoni*, 100 F. 2d 401, 402 (2 Cir., 1938). But *Peoni* merely holds that aiding and abetting (the act of the accessory) requires ". . . some affirmative participation . . . which at least encourages the perpetrator [principal]". It does not specify the full conditions of that participation. It is noteworthy however, that Judge Hand found himself compelled, for apparent want of more recent authority, to refer to the classical common law sources. *Peoni*, 402.

Systematic comprehension of the law of principal and accessory, essential to our contentions, has thus required our resort to authoritative common law sources. In our treatment of the matter, we have distilled out the relevant content of those sources, mainly Blackstone, 4 Comm. 34-40; 1 Hale, P.C., 233-239, 435-446, 612-626; Foster, *Crown Law*, 341-375; and Plowden, 97-101, 473-476. They provide not only the definitions of the words of 18 U.S.C. Sec. 2, but the logical structure and operating dynamics of the law of principal and accessory.

The facial simplicity of 18 U.S.C. Sec. 2 is deceiving, beguiling the reader erroneously to suppose that it increases the *severity* of the accessory's punishment. But the words "is punishable as a principal" do not enhance punishment of the accessory (aider and abettor) by inflicting punishment previously reserved to the principal, for at common law they were alike hanged. They are, rather, words of limitation which deprive the accessory of any privilege not enjoyed by the principal.

At common law, the privilege of "benefit of clergy" immunized clerics (ultimately defined as anyone who could read) from the processes of secular magistracy. Its successful invocation effectively ousted the court of jurisdiction, which then passed to the Ordinary of the bishopric for ecclesiastical disposition. (Their dispute over clerical privilege was what Henry the Second's dust-up with Becket was all about). Subsequent statutory denial of the cleri-

cal privilege at first applied only to principal felons. The words: " is punishable as a principal" extended denial of the privilege of benefit of clergy to accessories.

All other distinctions between principal and accessory were maintained, and with those distinctions, the body of law governing criminal liability of principals and accessories and the procedures for their prosecution. A statute making an accessory punishable as a principal, said Nathan Dane, "... only declares how accessories and principals ... shall be punished, preserving the ... description of accessories." (6 *Abridgment and Digest of American Law* 654).

Present 18 U.S.C. Sec. 2, was adopted in 1951, repealing 18 U.S.C., Sec. 550. *Pinkerton*, decided in 1946, relied upon the wording of Sec. 550, which provided that "Whoever ... aids, abets, ... [etc.] *is* a principal." Sec. 550 had completely abrogated the common law of principal and accessory by abolishing their distinction, without which the law of principal and accessory had no jural object upon which to operate. 18 U.S.C. Sec. 2 restored the common law.

Although *Pinkerton*, was decided at a time when 18 U.S.C. Sec. 550 had temporarily obliterated the distinction between principal and accessory, the court recognized the need for maintaining consistency between the theory of the indictment and the theory underlying conviction. The court was thus at pains to observe (*Pinkerton*, p. 646, n.6): "[Pinkerton] was not indicted as an aider or abettor ... (18 U.S.C. 550), nor was his case submitted to the jury on that theory." Presumably his indictment as an aider and abettor and conviction as a principal would either have required a different result or further justification by reference to the terms of the statute then in effect.

Despite the obvious difference the enactment of 18 U.S.C. Sec. 2 makes in the law of principal and accessory, courts have overlooked its impact upon application of

the *Pinkerton* doctrine. Rather, judicial attention has been attracted to the the more dramatic aspect of the doctrine, the adoption of the theory of vicarious criminal liability which it entails. As a consequence, when aiding and abetting occurs as an allegation in the context of a case in which the prosecution relies upon the theory of vicarious liability for conviction, it is treated almost as a form of vicarious liability itself.

Vicarious criminal liability is not a modern invention. It once was imposed upon the owner of a weapon, slave, or other instrumentality of crime committed without his knowledge or consent, though punishment usually entailed only its noxal surrender. See Holmes, O.W., *The Common Law*, 7-11. It survives in certain forfeiture law. See *United States v. United States Coin and Currency, etc.*, 401 U.S. 715, 719-720 (1971).

In point of fact accessorial and vicarious liability have no common theoretical bond. The law recognizes two and only two species of criminal liability:

1. Individual liability

2. Vicarious liability

Individual liability is either of two sorts: that of the principal felon; that of the accessory. To eliminate possible confusion between two uses of the word "principal", we employ an older term, "principal felon", to distinguish the principal of "principal and accessory" from the "principal" of the law of agency. Criminal liability either as accessory or principal felon has nothing to do with the law of agency.

The difference between the principal felon and the accessory is spatial. A principal felon is present at the fact, exceptions relating to such as the distant principal felon who laid out poisons to be ingested in his absence, or employed an animal or one legally incapable of acting as a principal felon (madmen and such) as a distant criminal tool.

An accessory (the aider and abettor, counselor, commander, inducer or procurer of 18 U.S.C. Sec. 2) *cannot* be present at the fact, for he is then a principal in the second degree and is treated procedurally and in all other respects as a principal. ("Accessory *at* the fact" is self contradicting.)

The guilt of both principal felon and accessory is imposed for what one so accused, *himself* did or said to accomplish a specific crime. Thus accessorial guilt is individual and personal, originating in what a man himself says or does to facilitate the crime. It is active, not passive. It is immediate to the accessory and not mediated, hence is independent of, although conditioned upon, the guilt of a principal felon.

Vicarious guilt on the other hand, e.g., *Pinkerton*, is not original in an accused. It is derivative, not personal. It is passive, not active. It originates in the guilt of another and is mediated by his relationship to the accused. That other person is one whose guilt is personal and unmediated, that is to say, the principal felon or an accessory to the principal felon.

The physical or verbal act of the accessory, however minor, must bear a causal relation to the completed offense.

Vicarious liability is incurred despite the absence of any such causal relation.

Intent to commit the crime and prior knowledge thereof are essential to accessorial liability.

Intent and knowledge are irrelevant to vicarious liability.

Thus while the punishments for vicarious guilt and accessorial guilt may be identical, their theoretical foundations have nothing whatever to do with one another.

The cases which have touched upon the problem we confront do not consider the effect of the repeal of the

statute from which *Pinkerton* drew its force. We have encountered but one case in which an objection similar to ours, but curiously framed, was seriously considered. That case, *United States v. Roselli*, 432 F.2d 879 (9 Cir., 1970) would treat aiding and abetting allegations as surplusage when *Pinkerton* liability is to be imposed upon one indicted as a substantive aider and abettor. *Roselli* (p.895, n.2) fallaciously reasons that because a man indicted as a principal may be found guilty where the evidence reveals him to have been an accessory, it must then follow that aiding and abetting language in an indictment is "simply surplusage." It seemed to the court that if the words were surplusage, no impediment precluded his conviction as a principal.

There are several things wrong with the *Roselli* suggestion. (1) It has always been the rule that one indicted as a principal felon may be convicted although the evidence reveals he aided and abetted. *United States v. Good Shield*, 544 F.2d 950, 952 (8 Cir., 1976). (2) It has *never* been the rule that one indicted as an accessory could be convicted as a principal felon. "If one be indicted as accessory before the fact and the evidence shows he was present [i.e., a principal] . . . he cannot be convicted . . . of the charge alleged, for the evidence does not support it." 6 Dane, *Abridgment and Digest of American Law* 655. Indeed, if the evidence reveals that a man indicted as accessory was a principal felon, his acquittal is required and is no bar to his subsequent prosecution as principal, 1 Hale P.C. 625. The reason for the rule is obvious. One indicted as an accessory is entitled to defend upon the supposition that the prosecution contends a person other than himself was the principal (there being no crime without a principal and a man cannot be his own accessory). (3) Finally, if the aiding and abetting language is treated as surplusage the indictment is stripped of *all* charging language upon which a judgment must rest, hence cannot sustain the conviction of a man not even charged.

In its opinion, the court below did not dispute our claim that there was no evidence of aiding and abetting, and agreed that our argument had logical appeal. It rejected our contentions, favoring *United States v. Redwine*, 715 F.2d 315, 322 (7 Cir., 1983) and *United States v. Meester*, 762 F.2d 867, 878 (11 Cir., 1985), remarking that those cases held that "persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* theory." (Opinion, App.8a)

In *Redwine* the point was not raised; in *Meester*, it was held to be a harmless variance absent a showing of prejudice. But it is not, of course, a matter of variance. It is a matter of formal logical congruence of indictment and verdict. If a man is indicted as an aider and abettor, his conviction as a principal felon implies that he aided and abetted himself, the logical absurdity of which was observed no later than 1613. Finch, H., *Law or a Discourse Thereof*, 387.

Meester gives no authority for its startling claim that a man indicted as an accessory can be convicted as a principal. And any authority must go beyond the mere arbitrary assertion of such a rule; it must provide a *theoretical* justification which demonstrates the systematic consistency of its rule with settled law. In default thereof, the *Meester* court is chargeable as arbitrary. The *Meester* result can only be justified as allowed by *Pinkerton* by denying the fact that the aiding and abetting statute on which *Pinkerton* is based has been repealed and replaced by 18 U.S.C. Sec. 2.

The beauty and stability of the law derive from its logical purity. If legal conclusions are compelled by the logic of the law itself, then those conclusion can *never* be arbitrary. But when courts pronounce as law conclusions which contradict conclusions logically *compelled* by the premises from which they are drawn, they are chargeable either as knowingly arbitrary and capricious, or professionally incapable of deft manipulation of the legal fabric.

By permitting conviction as principal felons persons indicted as aiders and abettors "pursuant to *Pinkerton*" the court below would appear to have adopted a third form of criminal liability hitherto unknown; a kind of amalgam of individual liability and vicarious liability. It is curious indeed to contemplate a body of law which forbids substantive conviction as a principal felon one indicted as an accessory, *except* and *unless* incurred vicariously pursuant to a conspiracy.

Nye and Nissen v. United States, 336 U.S. 613, 620 (1949) warned that *Pinkerton* was narrow in its scope. It has been permitted to proliferate thoughtlessly, to the point of choking out settled law. It ought not be allowed to do so.

II.

By failure to limit the aiding and abetting instruction to the substantive counts the jury was permitted to find petitioner vicariously guilty of the substantive counts although guilty of conspiracy only as an aider and abettor and not as a principal felon.

In each of the Travel Act counts (2-7) a single defendant was charged as principal, all remaining as accessories. Petitioner was not named as principal in any count. No aiding and abetting evidence was offered as to any defendant.

Per *Pinkerton v. United States*, 328 U.S. 640 (1946) membership in a conspiracy gives rise to vicarious liability for substantive offenses via the agency relating the members.

While we know of no case so holding, it is obvious that all parties to a conspiratorial agreement are conspiratorial principal felons. Others who are not parties to that conspiratorial agreement, hence not members, may yet be aiders and abettors of the conspiracy charged, and found guilty on a conspiracy charge because of it. See *United*

States v. Galiffa, 734 F.2d 306, 311 (7 Cir., 1984) and cases cited therein. But that does not change their status as aiders and abettors, hence they are not principal felons -

Ergo: They are not members.

Accessories to the commission of crimes are as punishable as principal felons. But there is a vast difference between being *punishable* as an aider and abettor of a conspiracy and being a *member* of that same conspiracy. For it is conspiratorial membership, not punishability, which creates the agency requisite to vicarious liability via *Pinkerton*.

Without an agency, the possibility of vicarious liability for substantive crimes in furtherance of the conspiracy evaporates. We noted in Point I, *supra*, that accessories (aiders and abettors) and principal felons are not agents for one another. And that the law of principal and accessory, whose province is the law of crimes, has nothing to do with vicarious liability, whose province is the law of agency. They share no common theoretical foundation in historical or philosophical jurisprudence. One is predicated upon fault, a moral attribute; the other upon status, a relation. That they are similarly punished is accidental - not essential, and is not part of the description of either.

The court below states (App. 21a) that the aiding and abetting instructions were limited to the Travel Act (the substantive offenses). The court is mistaken. There was no such limitation, either expressed or implied. Nor were the standardized aider and abettor instructions positioned in the charge as to give rise to any inference that their application was limited to the substantive offenses. The instructions are numbers 80 and 81, Transcript of January 16, 1986, pp.76-77.

We adverted earlier to the need to distinguish individual and vicarious liability in applying the *Pinkerton* rule, and that their thoughtless admixture in the course of its application gives rise to hitherto unknown forms of liabil-

ity, partaking of each, bound by the rules of neither, and forming an amorphous and indigestible amalgam.

One need look no further for an example.

III.

The indictment, although expressed in the language of the statute, failed to state an offense.

We do not question the force of the stock rule that it is ordinarily sufficient to the validity of an indictment to express the charge in the words of the statute under which it is brought.

But the rule is subject to exceptions, for:

> "... where the [statutory] definition of an offense includes generic terms, it is not sufficient that the indictment shall charge in the same generic terms as in the definition, but it must state the species, it must descend to particulars." *United States v. Hess*, 124 U.S. 483, 487 (1888),

following *United States v. Cruickshank*, 92 U.S. 542, 558 (1875) and followed by *Keck v. United States*, 172 U.S. 434, 437 (1899) and *Russell v. United States*, 369 U.S. 749, 764 (1962).

Crucial language of 18 U.S.C. §1952 is in almost wholly generic terms which without descent to particulars provide no useful information whatever, either to a court called upon to determine if the ultimate facts upon which the government relies fall within or without the charging statute, or to a defendant called upon to plead to or defend against the charges.

§1952 provides a two-stage format for its violation: (1) Use of a facility in interstate commerce (transportation or communication) with intent to perform any of three enumerated unlawful acts, and "thereafter" (2) Performance or an attempt to perform one of those acts.

The two species of "thereafter act" alleged here, per

§1952 were §1952(a)(1) Distribution of proceeds of unlawful activity, and §1952 (a) (3) Promotion, management, establishment, carrying on an unlawful activity.

The substantive counts (counts 2-8) were each patterned thus:

On a [specified] date in a [specified] District a [specific] defendant used a [specified] facility in interstate commerce with intent to distribute the proceeds (Count2) or promote, manage, etc. (Counts 3 - 8) a gambling business in violation of [specified] Nevada statutes and;

"*thereafter*" [at an unspecified time] said [specific] defendant, performed [unspecified] "*acts*" to distribute the proceeds of or promote, manage, etc., and the other defendants [by name] aided and abetted him.

While the foregoing formulation adequately informs a defendant of the time, manner, and intent of the interstate use and the identity of the principal felon, it fails to provide any distinct notion of either the nature of the "thereafter act" or when that act took place.

A. Failure to specify time of the "thereafter" act.

When we say that with respect to an event, a second event occurred "thereafter", we are informed as to the second only that it did not precede the first. At the least, events whose time of occurrence may be in doubt to the pleader, can be designated as having occurred "on or about" a day certain. But to allege in a 1983 indictment only that events occurred after a date five years earlier is to say no more than "sometime." By establishing a *sequence* for events to constitute a violation, surely it cannot be urged that the Congress proposed that a pleader need state only that there *was* such sequence and should be excused from filling in the second blank in the congressionally prescribed formulary.

The performance of a "thereafter" act completes the

corpus delicti of the crime. Criminal statutes of limitation run from that very date. Forfeitures, often effecting the rights of innocent third party transferees, are exacted as of that date and not the date of the ensuing conviction.

The importance of fixing the date of the offense is of peculiar significance under this statute, for it is by no means clear whether successive thereafter acts following a *single* interstate use constitute severable prosecutable offenses or whether multiple uses of interstate facilities ripen into multiple violations by the commission of a *single* "thereafter" act which is "thereafter" with respect to all of them.

Thus pleas of *autrefois convict* or *acquit* may be conditioned upon the time of the *corpus delicti*-completing "thereafter" act.

B. Failure to specify the nature of the "thereafter act".

No word of similar intention can be more extensive in scope than "distribute." Examination of the indictment ought to provide some inkling as to what is meant thereby. Distribution of proceeds can mean anything from sharing them with partners in crime (surely intended by the congress to constitute a violation) to paying the taxes thereon therefrom (possibly not a violation) to buying a new hat or returning the money to its true owners (just as surely *not* violations). The question is not, however, whether the evidence ultimately shows a violation did or did not occur by the distribution. It is rather, whether a court in examining the indictment is supplied with sufficient facts to make that determination prior to trial, and whether a defendant is supplied with sufficient facts so that he is enabled to prepare to contradict them if he can.

Similar criticism is applicable to such words as "promote", "manage" and the like. Those are not verbs that compel a mental image such as "swim", "carry", "fly" and the like. Their domain is such as to require some further

specification to make them meaningful to a defendant.

These objections to the over-general character of the language of the indictment are exacerbated when used in connection with the liability of an accessory. A principal felon may have an idea what is intended, if he in fact committed certain acts. But how is an accessory to know? An indictment does not, after all, create rights and obligations in the several defendants *inter se*. One named as accessory very probably has no idea what the principal felon was up to. And when the government's theory is that the defendants are vicariously liable, hence actual knowledge of specific events is not an element of their crimes, almost surely they must be at sea as to what they are charged with.

In rejecting our complaint that the substantive counts failed to state offenses with sufficient specificity (App. 23a). The court below agreed that a defendant is entitled to a concise statement of the *facts* constituting the offense charged. But the "thereafter" allegations consisted entirely in conclusions, not ultimate facts. The court made *no* ruling concerning the "thereafter" allegations, omitting them entirely from its summary of the indictment (notes 6, 7, App. 9-10 a). As to allegations of interstate use, we made, and make now no objection. Attention below, as here, was and is directed entirely to the factual portion of the offense which completed the *corpus delicti* of each substantive count. In effect, the government pled those allegations:

"See statute."

IV.

Adoption of points of other petitioners

Petitioner Joseph Lombardo moves for leave to adopt the arguments advanced on behalf of petitioners John Cerone, Milton Rockman, Joseph Aiuppa and Angelo LaPietra in their applications to this court for certiorari to

the United States Court of Appeals for the Eighth Circuit in the cases there consolidated and docketed as numbers 86-1439 to 1443, inclusive.

CONCLUSION

For the foregoing reasons petitioner Joseph Lombardo urges the court to issue its writ of certiorari to the end that the opinion of the court below be reversed.

Respectfully submitted,

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APPENDIX

In The
United States Court of Appeals
For The Eighth Circuit

No. 86-1439
United States of America,
Appellee,

v.

John Peter Cerone,
Appellant.

No. 86-1440
United States of America,
Appellee,

v.

Milton John Rockman,
Appellant.

No. 86-1441
United States of America,
Appellee,

v.

Joseph John Aiuppa,
Appellant.

No. 86-1442
United States of America,
Appellee,

v.

Angelo LaPietra,
Appellant.

No. 86-1443
United States of America,
Appellee,

v.

Joseph Lombardo,
Appellant.

Appeals from the
United States
District Court
for the Western
District of Missouri.

Submitted: May 11, 1987
Filed: October 8, 1987

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

BRIGHT, Senior Circuit Judge.

John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, Angelo LaPietra and Milton John Rockman appeal their convictions for conspiracy to travel in interstate commerce and use interstate facilities with the intent to promote and carry on an illegal activity in violation of the Travel Act, 18 U.S.C. §§ 371, 1952, and on seven substantive Travel Act violations. The appellants raise nineteen allegations of error, some collectively, other individually. For the reasons discussed below, we affirm the convictions.

I. BACKGROUND

The indictment charged that the defendants and several unindicted co-conspirators sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and Fremont, in violation of Nevada gaming laws. These casinos were owned by the Argent Corporation which, in turn, was owned by Allen R. Glick. Glick's purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators obtained control of Argent Corporation by helping Glick to obtain financing and by placing two of their people, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control of the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund along with Roy Williams, a Teamsters official.

The Government charged that the conspirators were able to control Argent and the Union because they were members of organized crime "groups" in various Midwestern cities. Aiuppa was the boss of the Chicago group, with

Cerone as its underboss. LaPietra and Lombardo were members of the Chicago group, and Rockman was an associate of the Cleveland group.[1]

At trial, the Government introduced the testimony of Glick, Angelo Lonardo, a Cleveland underboss, Roy Williams and Carl Thomas, among others. The Government also produced evidence consisting of tape recordings, notes made by DeLuna, and surveillance testimony by FBI agents.

According to the Government's theory of the case, in early 1974, Frank Balistrieri agreed to help Allen Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Nick Civella and Milton Rockman, who each controlled a trustee of the pension fund. Glick then received his loan.

After Glick bought the casinos, Balistrieri and the others required Glick to promote Frank Rosenthal to a management position at Argent. Rosenthal supervised the skimming of gambling proceeds from the casinos. Later, Carl Thomas was placed in charge of the operation for a short time.

Initially, the Kansas City, Milwaukee and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose between the groups, and the Chicago group stepped in to resolve the problem. Thereafter, the Chicago group, including appellants Aiuppa, Cerone, Lombardo and LaPietra, shared the skimming proceeds.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and

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[1] Co-conspirator Nick Civella headed the Kansas City group, and co-conspirator Frank Balistrieri was the head of the Milwaukee group.

was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. LaPietra became DeLuna's contact with the Chicago group after the death of a previous contact. Appellant Rockman also acted as a contact with DeLuna for the Cleveland group, and as an intermediary with the Chicago group.

Typically, the skimmed money was delivered from Las Vegas to Chicago. LaPietra delivered the skimmed money to Anthony Chiavola, Sr. of Chicago who, in turn, delivered the skimmed money to DeLuna for the Kansas City group and gave the Cleveland group's share to appellant Rockman.

During the period 1976 to 1979, Rosenthal had various widely publicized problems with the Nevada licensing authorities, who considered him to be unsuitable for working as a key employee of a casino. The conspirators were concerned that Rosenthal's problems might jeopardize their interest in Las Vegas casinos and in the skimming operations, and they had numerous conversations about replacing Rosenthal. During the same period, the conspirators also had problems with Allen Glick who was reluctant to accept their control of Argent through Rosenthal. Nick Civella and Carl DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal's direction. Glick yielded to their demands.

In October 1977, independent investment managers took over management of the pension fund's assets, which hindered the conspirators' ability to control the pension fund, to obtain loans and receive other favorable treatment. Thereafter, the conspirators, principally appellant Lombardo and Allen Dorfman, had numerous strategy discussions concerning their efforts to replace the independent managers and other individuals with persons controlled by the conspirators. From 1979 to 1981, the conspirators, including appellants Aiuppa, Cerone, Lombardo and Rockman, took measures to support Roy Williams

to succeeds Frank Fitzsimmons as Teamsters president and later to support Jackie Presser to succeed Williams in order to maintain the conspirators' influence with the Teamsters Union.

In 1978, DeLuna told Allen Glick that his "partners" were "sick of" dealing with him and that they would kill him unless he sold Argent Corporation. Thereafter, Glick publicly announced his intention to sell Argent and three groups began to negotiate with Glick to buy Argent. In December 1979, Glick sold Argent to Trans-Sterling, Inc.

From March 1978 to May 1980, law enforcement officials conducted many court authorized electronic surveillances of various telephones and locations in Kansas City, Missouri; Leavenworth, Kansas; Las Vegas, Nevada; Chicago, Illinois; and Milwaukee, Wisconsin, including the residences of Carl DeLuna, Anthony Civella, Jose Agosto, and Anthony Chicavola, Sr., and the business offices of Allen Dorfman. Lombardo, Rockman and LaPietra were intercepted during the electronic surveillances.

Law enforcement officials also conducted various court authorized searches and seizures of records and documents. For example, on February 14, 1979, officials seized address and phone books, papers, and other documents from Carl DeLuna's home in Kansas City, Missouri, which contained DeLuna's notes of meetings and telephone conversations among the conspirators, telephone numbers and disbursement of funds in connection with the skimming operation (hereinafter "the DeLuna notes").

On September 30, 1983, a grand jury in Kansas City, Missouri, returned an eight-count indictment against fifteen defendants, charging them with violations of 18 U.S.C. §§ 2, 371, 1952. Carl Civella, Peter Tamburello, Anthony Chiavola, Sr. and Anthony Chiavola, Jr. entered

guilty pleas prior to trial. The district court [2] severed the case of Anthony Spilotro from the others, and he died several months after trial. Carl DeLuna and Frank Balistrieri pled guilty during trial. The court dismissed the indictment against Carl Thomas during trial, and he then testified as a government witness. After the close of the government's case, the court entered judgments of acquittal as to John and Joseph Balistrieri.

II. DISCUSSION

A. Sufficiency of the Evidence on Count I

All five appellants contend that the evidence was insufficient to convict them on count I, conspiracy to maintain an undisclosed interest in the gaming interests of Allen Glick. They argue that the evidence failed to show their maintenance of a hidden interest. Rather, at most, the evidence showed a common purpose to skim money by extortion, embezzlement or theft. Some of the defendants contend that the evidence showed that they were merely collecting a "finder's fee" for their assistance to Glick in obtaining his pension fund loan.

When reviewing the sufficiency of the evidence for a criminal conviction, we just view the evidence in the light most favorable to the jury's verdict. *United States v. Randle*, 815 F.2d 505, 508 (8th Cir. 1987); *United States v. Roenigk*, 810 F.2d 809, 813 (8th Cir. 1987). So viewed, we determine that the evidence was sufficient to convict the appellants on count I as charged in the indictment.

Uncontradicted evidence showed that Frank Rosenthal obtained a managerial position with Argent, that he directed the skimming operation at the casinos and that he acted at the direction and for the benefit of the conspirators. Frank Balistrieri, Nick Civella and Rockman

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[2] The Honorable Joseph E. Stevens, Jr., United States District Judge for the Eastern and Western Districts of Missouri.

obtained this influence over Argent by arranging for Glick to receive the pension fund loan. All the appellants shared in the skimming proceeds and discussed the working of the operation among themselves. As this court held in *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), indirect receipt of gambling moneys without the necessary licenses and in violation of state law constitutes a violation of the Travel Act. 763 F.2d at 907. Furthermore, we note that the indictment here is nearly identical to that charged in the *DeLuna* case.[3] We are bound by *DeLuna's* holding that evidence of the receipt of skimmed moneys from a Nevada casino serves as a sufficient basis to sustain the convictions under the Travel Act indictment. *Id.* at 906-07.

We also reject appellants' argument that a variance in proof existed from what was charged in the indictment. As discussed above, sufficient evidence existed to support the convictions as charged in the indictment. Furthermore, appellants can show no prejudice from any alleged variance. Prior to trial, several co-defendants challenged the indictment, claiming that the charges were the same as those on which they had previously been convicted in the so-called Tropicana case, *United States v. DeLuna, supra.* In response, the Government submitted a detailed offer of proof as to what it expected to prove in this case. *United States v. Thomas*, 759 F.2d 659, 664-65 (8th Cir. 1985). With this sort of information, appellants can claim no prejudice or surprise from the evidence presented at trial.

B. *Pinkerton* Instruction

The appellants were indicted as aiders and abettors on seven substantive counts of violating the Travel Act. The court instructed the jury on theories of aiding and abetting, as well as vicarious liability under the doctrine of *Pinker-*

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[3] *DeLuna* involved skimming from another Las Vegas casino, the Tropicana.

ton v. United States, 328 U.S. 640 (1946).[4] Appellants argue that the district court erred in submitting both theories to the jury. They contend that the evidence was insufficient to convict them of aiding and abetting. Consequently, the jury must have found them guilty by reason of vicarious liability. This, they claim, is improper because they cannot be convicted as principals under vicarious liability when they were indicted as accessories under an aiding and abetting theory.

Even assuming that the evidence failed to prove aiding and abetting, we do not agree with appellants' argument. Other circuits have held that persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* instruction. *United States v. Meister*, 762 F.2d 867, 878 (11th Cir.), *cert. denied*, 106 S. Ct. 579 (1985); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Although appellants' argument may have some logical appeal, clearly the law fails to support their position.

C. Double Jeopardy

Appellants claim that their convictions for conspiracy and for substantive acts taken in furtherance of the conspiracy under a theory of vicarious liability violate the Double Jeopardy Clause of the Constitution.

It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy. *Albernaz v. United States*, 450 U.S. 333, 344-45 n. 3 (1981); *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975). That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant. Rather, the focus must be on the offenses and

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[4] Under *Pinkerton*, a party to a continuing conspiracy may be responsible for substantive offenses in furtherance of the conspiracy even though that party does not participate or know of the substantive offenses.

whether each offense requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also Albernaz*, 450 U.S. at 337-39; *Whalen v. United States*, 445 U.S. 684, 691-93 (1980).

The elements of criminal conspiracy (count I) are: (1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants. *United States v. Raymond*, 793 F.2d 928, 931-32 & n. 3 (8th Cir. 1986).[5]

Count II through VIII allege violations of 18 U.S.C. §§ 2, 1952, the elements of which are: (1) aiding and abetting; (2) the interstate travel or use of interstate facilities; (3) with intent; (4) to promote or manage an unlawful activity; and (5) the actual or attempted promotion or management of the unlawful activity. 18 U.S.C. §§ 2, 1952.[6]

Upon analyzing the elements of the offenses, it is apparent that conspiracy includes an element that the sub-

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[5] Count I alleged that appellants conspired to use interstate facilities to carry on the unlawful activity of maintaining an interest in the gambling operations of Allen Glick and indirectly receiving gambling proceeds without being licensed in violation of Nevada gaming laws. Appellants obtained this interest through their control of the Teamsters Union Pension Fund.

[6] Count II alleged that appellants aided and abetted Anthony Chiavola, Sr. on October 7, 1978 to travel and distribute unlawful gambling proceeds.

Count III alleged that appellants aided and abetted Anthony Chiavola, Sr. on December 21, 1978 to make arrangements via telephone for meeting to discuss their interests in the gambling operation.

Count IV alleged that appellants aided and abetted Carl Thomas on November 13, 1978 to discuss by telephone with Nick Civella the operation of the unlawful gambling activity.

Count V alleged that appellants aided and abetted Carl DeLuna on November 16, 1978 to telephone and discuss a proposed change of ownership of Glick's casino with Joseph

(Footnote continued on the following page)

stantive offense does not; namely, an agreement. Appellants, however, argue that the convictions violate the Double Jeopardy Clause because (1) under the *Pinkerton* theory of liability, conspiracy is an element of the substantive offenses, and (2) aiding and abetting requires or at least implies an agreement. Thus, under either of these arguments, double jeopardy is violated because each offense requires identical elements to be proven.

We cannot accept appellants' first argument. *Pinkerton* itself disposed of their argument. The Court there held that convictions for conspiracy and substantive acts committed in furtherance of the conspiracy do not violate the Double Jeopardy Clause, even though the substantive conviction was obtained solely by means of participation in the conspiracy. *Pinkerton*, 328 U.S. at 646-47. We are bound by *Pinkerton*.

Appellants' second argument in this regard is somewhat more difficult. They contend that the substantive offenses also require proof of an agreement because aiding and abetting implies that at least two people are involved

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6 *(Continued)*

Agosto and the continuing receipt of unlawful gambling proceeds.

Count VI alleged that appellants aided and abetted Carl DeLuna on November 20, 1978 to telephone Joseph Agosto and discuss the unlawful skimming operation.

Count VII alleged that on January 11, 1978, John Cerone travelled to Kansas City to meet with Carl Civella, Carl DeLuna and Nick Civella to discuss the sale of Glick's casinos and their continuing skimming operation, and that the other appellants aided and abetted this act.

Count VIII alleged that appellants aided and abetted Carl DeLuna on January 16, 1979 to telephone Joseph Agosto and discuss a message to Joseph Aiuppa, the visit of John Cerone, Glick's casinos and the unlawful skimming operation.

and agree to be involved.[7] Thus, the substantive offenses and the conspiracy count require the same elements to be proven.

However, as the Supreme Court noted in *Iannelli*, agreement remains the essential element of (conspiracy) crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact. 420 U.S. at 777, n.10.

Appellants are essentially advancing the application of Wharton's Rule, which requires merger of the substantive offense and the conspiracy when the substantive crime requires two or more persons for its commission. *Iannelli v. United States*, 420 U.S. 770, 773 & n. 5 (1975). The Rule itself does not rest on double jeopardy principles. *Id.* at 782. The Supreme Court has determined that Wharton's Rule is merely an aid in determining whether Congress intended to create separate offenses. *Id.* at 786. The Court noted that the crimes to which Wharton's Rule classically applied have three general characteristics: (1) general congruence of the agreement and the substantive offense; (2) the parties to the agreement are the only ones who commit the substantive offenses; and (3) the consequences of the substantive crime rest on the parties rather than society that the law of conspiracy seeks to avoid. *Id.* at 782-83.

Using these factors and examining legislative intent, the *Iannelli* Court analyzed a closely analogous offense to that charged here, 18 U.S.C. § 1955. The Court determined that Wharton's Rule does not apply to section 1955. Furthermore, the legislative intent behind the Organized Crime Control Act of 1970, of which section 1955 is a part, demonstrates a clear legislative judgment to punish conspiracy and the substantive offense as separate crimes *Id.* at 791.

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[7] Except for count II, the substantive offenses by themselves require two or more individuals to act together and thus imply an agreement.

Applying these considerations to the present case, it is clear that Wharton's Rule does not operate to merge the conspiracy and the substantive offenses. Although the parties to the agreement are the same as those committing the substantive crimes, the conspiracy and substantive offenses are not generally congruent. The conspiracy contemplates a scheme much greater in scope than that encompassed by the substantive offenses. Furthermore, the consequences of the substantive crimes do not rest solely on the parties, rather society at large is affected.

Most importantly, the legislative history underlying the Travel Act indicates that Congress did not intend conspiracy to merge with aiding and abetting a Travel Act offense. The Travel Act was enacted to provide federal assistance in the prosecution of organized crime. H.R. Rep. No. 966, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2665. Congress specifically intended that the Travel Act by prosecuted in conjunction with the aiding and abetting statute so that those who directed others to carry out their illegal missions could be prosecuted. H.R. Rep. No. 966, 87th Cong., 1st Sess. 3, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2666. In addition, conspiracy was proposed as an element of section 1952, but was rejected. 107 Cong. Rec. 13,943 (1961). Accordingly, we believe Congress intended that aiding and abetting a Travel Act offense be a separate offense from conspiracy, and double jeopardy principles are not violated by a prosecution for both offenses.

Thus, under either theory presented by appellants, the Double Jeopardy Clause has not been violated.[8]

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[8] Nevertheless, we are troubled by the multiple sentences for conviction which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also served as proof of the conspiracy. The district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences.

D. Jury Instruction

Appellants argue that the district court erroneously instructed the jury on intent. Specifically, they contend that the following instructions are erroneous:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made or done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Jury Instruction No. 74; and

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

Jury Instruction No. 76.

Appellants contend that these instructions impermissibly shifted the burden of proof from the Government to the defendants and thus violated their due process rights. We do not agree.

First, Instruction No. 74 merely instructs the jury that it may find that a person intends the natural and probable consequences of his knowingly done acts. The creation of this inference does not necessarily violate due process. *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *see also Sandstrom v. Montana*, 442 U.S. 510, 515 (1979). The challenged instruction violates due process only if "the conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.*

Applying this standard to the present case, it is clear that Instruction No. 74 does not relieve the Government of its burden to prove intent. Rather, it allows the jury to make an inference as to intent. Furthermore, the instruction immediately reminds the jury that the inference is merely permissive and that "it is entirely up to [the jury] to decide what facts to find from the evidence." Accordingly, Instruction No. 74 does not violate appellants' due process rights.

Instruction No. 76 presents a more difficult issue. Appellants contend that because the Travel Act offenses are specific intent crimes, the district court erred when it instructed the jury that every person is presumed to know the law.

Although we agree with appellants that the substantive Travel Act offenses are specific intent crimes, it does not follow that the challenged instruction is erroneous. The Government need not show that appellants knew that a law existed to penalize their conduct. *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir. 1986). Sometimes, however, a specific intent crime requires that the defendant have knowledge of a legal requirement. *Id.*

In this case, appellants present a difficult issue. Knowledge of the licensing requirements under Nevada law would appear to be required for the Travel Act offenses. Instruction No. 76, however, seems to negate the Government's burden of proof in this regard.

Assuming that this instruction is erroneous, we must examine the record to determine whether such an error is harmless. *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986). reviewing the record as a whole, we cannot say that the appellants received an unfair trial or that this error affected the composition of the record. The challenged instruction did-not create a conclusive presumption, and another instruction advised the jury that the Government had to prove that appellants "knowingly did an act which the law forbids, purposely intending to violate the law." Jury Instruction No. 73. Moreover, the Government adduces ample evidence for the jury to find specific intent. Thus, in light of the record as a whole, any error in the jury instruction that may have introduced a confusing element as to the Government's burden of proving specific intent amounts to harmless error in this case.

E. Disclosure of Informants

Appellants argue that they were deprived of a fair trial because the district court refused to disclose the identity of two confidential informants. Prior to trial, the appellants asked for the identity of the informants and any statements they made, stating that such information "may be relevant and helpful to the defense."

The district court examined various statements and reports *in camera* and also interviewed one of the confidential informants. The court found that one informant did not convey any information to the FBI that was relevant or helpful to the defense. The other informant conveyed information that was used by the FBI to establish probable cause for court-ordered surveillance. The court concluded that disclosure was not required in light of the cir-

cumstances of this case, the need for the informants' safety and the information they conveyed.

The district court did not abuse its discretion by refusing to disclose the identity of the confidential informants. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court stated the governing test for disclosure. When disclosure of an informant's identity would be material and helpful, the public interest in protecting the flow of information is overcome. *Id.* at 60-62. The defendant has the burden of showing materiality. *United States v. Grisham*, 748 F.2d 460, 463-64 (8th Cir. 1984). Because such a showing may be difficult, the district court may hold an *in camera* proceeding to determine materiality. *Id.* at 464.

In the present case, the appellants only speculated that the confidential informants could provide them with relevant and helpful information. Nonetheless, the district court examined the confidential information *in camera* and concluded that disclosure was not warranted. In reaching its conclusion, the court correctly applied the *Roviaro* test and looked to the circumstances of the case. Accordingly, the district court did not abuse its discretion when it refused to order disclosure of the informants' identity.[10]

We are troubled, however, by the Government's admission on appeal that one of the informants actually testified at trial. This admission apparently came as a surprise to the appellants. The Government, however, has indicated that it informed the appellants at trial that one of the witnesses was a confidential informant.

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[10] In addition, other relevant factors relating to the safety of the witnesses cautioned against disclosure. In 1982, Frank Rosenthal's car was bombed. In 1983, Allen Dorfman was shot and killed. In 1986, the bodies of co-defendant Anthony Spilotro and his brother were discovered in an Indiana cornfield. In light of the physical danger of the informants and the lack of materiality, the court's decision reflects an appropriate balancing of interests.

This incident does not warrant reversal of appellants' convictions. The Government provided all the necessary information to defendants prior to the witness' testimony, and the defendants conducted a thorough cross-examination. Appellants have demonstrated no prejudice from the Government's later use of an undisclosed confidential informant as a witness. Accordingly, the district cour's refusal to disclose the informant's identity and the Government's subsequent disclosure that one of the informants testified does not constitute any reversible error.

F. Admisssion of Uncharged Crimes

Appellants argue that in numerous instances the district court erroneously admitted evidence of "other bad acts." Among other things, appellants challenge the admission of the statement that Allen Dorfman "was shot dead on the street," and prosecution's presentation of testimony by Angelo Lonardo, Ken Eto, Roy Williams and Aladena Fratianno. In this argument, the defendants also allege error in the introduction of the DeLuna notes that were also admitted at the prior Tropicana trial.

These contentions lack merit. Appellant Lombardo's counsel elicited the statement about Dorfman and no objection was made. Improper testimony by Lonardo was stricken from the record, and the court properly instructed the jury to disregard Lonardo's improper responses. The testimony of Williams, Eto and Fratianno did not implicate appellants in other crimes. Although the DeLuna notes were admitted in another trial to prove a different conspiracy, the notes admitted in the present case were relevant to prove the conspiracy charged. There is nothing impermissible in using the same evidence to prove two separate crimes. Evidence that is probative of the crime charged and not relevant solely to uncharged crimes is not "other crimes" evidence. *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir. 1985). We determine that the district court committed no error as to the challenged evidence.

G. Admission of Co-Conspirator Statements

All the appellants argue that insufficient evidence independent of co-conspirator statements existed and thus the co-conspirator statements, including the DeLuna notes, should not have been admitted. Without these statements, appellants argue that insufficient evidence exists to support their convictions.

We note that the admissibility of co-conspirator statements is determined by the trial judge and he may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted. *Bourjaily v. United States*, 107 S. Ct. 2775, 2780-82 (1987). Furthermore, the trial court need only determine that a conspiracy existed and that a defendant participated in it. The court is not required to independently inquire into the reliability of the co-conspirator statement. *Id.* at 2782-83.

Accordingly, appellants' argument that the co-conspirator statements should not have been admitted because no independent evidence existed to show a conspiracy, and their participation in it, must be rejected.[11] Thus, the evidence, when viewed in the light most favorable to the Government, is sufficient to support appellants' convictions.

H. Admission of DeLuna Notes

Appellant Aiuppa argues that the DeLuna notes were improperly admitted against him. He claims that the notes were not properly authenticated, were not in furtherance of the conspiracy, insufficient independent evidence connected him to the conspiracy, and the notes' admission violated his sixth amendment confrontation rights.

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[11] In addition, we observe that the Government produced direct evidence of the conspiracy and appellants' participation in it. Allen Glick and Angelo Lonardo testified to their personal knowledge of the appellants' activities.

As noted above, *Bourjaily v. United States*, *supra*, disposes of several of Aiuppa's arguments. It is not necessary that solely independent evidence connect Aiuppa to the conspiracy. Rather, the notes themselves may aid in the connection. 107 S. Ct. at 2782. Nor does their admission violate Aiuppa's confrontation rights. Because the notes were admissible as con-conspirator statements under Fed. R. Evid. 801(d) (2) (E), *DeLuna*, 763 F.2d at 909, Aiuppa's confrontation rights were not violated. The requirements for admission under the Federal Rules of Evidence are essentially the same as the confrontation clauses requirements. *Bourjaily*, 107 S. Ct. at 2782.

In addition, the evidence shows authentication of the DeLuna notes. An analysis of the notes seized in a search of DeLuna's home revealed that DeLuna had written the notes. The notes carried DeLuna's fingerprints. Thus, the notes were properly authenticated as declarations of a co-conspirator. *See DeLuna*, 763 F.2d at 908-09; *United States v. Helmel*, 769 F.2d 1306, 1312 (8th Cir. 1985). The notes were also in furtherance of the conspiracy. They documented numerous meetings among the conspirators and other events, which were corroborated by surveillance and testimony of several witnesses. Accordingly, the district court committed no error in admitting the DeLuna notes.

I. Voice Identification

Appellant LaPietra argues that the Government failed to adequately identify his voice in several tape recorded phone calls and accordingly, those tapes may not be used to connect him with the conspiracy.

The district court did not err when it allowed the identification of LaPietra's voice. FBI Agent Thomeczek testified as to his supervision of the recordings and that he listened to all tapes used as exhibits. He also spoke with LaPietra several times after the indictment was issued and testified that the voice in question was that of LaPietra.

Any person may identify a speaker's voice if he has heard the voice at any time. *United States v. Smith*, 635 F.2d 716, 719 (8th Cir. 1980); *United States v. Vitale*, 549 F.2d 71, 73 (8th Cir.), *cert. denied*, 431 U.S. 907 (1977) (per curiam). Minimal familiarity is sufficient for admissibility purposes. Attacks on the accuracy of the identification go to the weight of the evidence, and the issue is for the jury to decide. *Smith*, 635 F.2d at 719; *Vitale*, 549 F.2d at 73.

Accordingly, the district court did not abuse its discretion when it admitted the identification of LaPietra's voice into evidence.[12]

J. Withdrawal of Overt Act 51 From Jury Consideration

LaPietra also contends that the district court erred when it instructed the jury to disregard overt act 51. At trial, it was admitted that LaPietra's voice was misidentified in the phone call constituting overt act 51. LaPietra argues that the court's instruction prevented the jury from considering exculpatory evidence because the misidentification was helpful to his defense.

We cannot agree with LaPietra's contention. The court did not instruct the jury to disregard evidence of misidentification. Rather, the court instructed the jury to consider LaPietra's defense of voice misidentification and to determine whether the identification was reliable under the circumstances. Jury Instruction No. 92. Accordingly, the court did not deprive LaPietra of his defense.

K. Conspiracy Instruction

Appellant Cerone argues that the district court erroneously instructed the jury that the defendants were guilty

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[12] LaPietra also argues that the evidence failed to show that he drove a car under surveillance on August 16, 1978. This argument is irrelevant because LaPietra was not charged with driving the car. The only relevant event for that date was a meeting among several co-conspirators, one of whom was LaPietra.

of conspiracy if they aided and abetted a substantive count. Alternatively, Lombardo contends that the district court erred by failing to limit the aiding and abetting instructions to the substantive counts.

Upon examining the jury instructions, we determine that appellants' arguments are without merit. The court correctly instructed the jury on the elements of conspiracy. The court then explained the three essential elements of the Travel Act so that the jury could consider the objects of the conspiracy. The aiding and abetting language refers to the substantive Travel Act offenses, not conspiracy. Furthermore, the court clearly instructed the jury that the "gist of the offense" was an agreement. Accordingly, the district court did not commit prejudicial error in its conspiracy instructions.

L. Cerone's Conviction on Count VII

Appellant Cerone argues that the evidence fails to prove that he traveled from Chicago to Kansas City for illegal purposes as alleged in count VII of the indictment. He contends that, at most, the evidence showed he traveled from Kansas City to Chicago. Because the evidence failed to support the offense charged in the indictment, Cerone argues that his convicton must be reversed.

Viewed in the light most favorable to the Government, the evidence showed that Cerone lived in Chicago and was observed leaving Kansas City on January 11, 1979 and arriving at the Chicago airport later that day. Earlier the same day, FBI agents observed Carl DeLuna pick up two unidentified men at the Kansas City airport. They later arrived at Anthony Civella's residence. DeLuna later drove Cerone to the airport in the same car observed earlier. In addition, a DeLuna note recorded that DeLuna met with Cerone and Civella on January 11, 1979 to discuss negotiations to buy Argent. Thus, although no direct evidence established the Chicago to Kansas City flight, the circumstances would enable the jury to infer that Cerone

traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation. Accordingly, a reasonable jury could convict Cerone on count VII, and we sustain his conviction.

M. Identity of LaPietra's Code Name

LaPietra argues that the district court erred when it allowed FBI Agent Ouseley to testify as an expert witness and identify LaPietra as having the code name "Pitsacuni," He contends that Ouseley was not sufficiently qualified as an expert and that the evidence failed to support Ouseley's conclusion that LaPietra was "Pitsacuni," [13]

A witness may testify as an expert if the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue * * *." Fed. R. Evid. 702; *Federal Crop Ins. Corp. v. Hester*, 765 F.2d at 728; (8th Cir. 1985). *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1254 (8th Cir. 1985). A witness may be qualified as an expert based on practical experience. *Circle J. Dairy, Inc. v. A. O. Smith Harvestore Prods.*, 790 F.2d 694, 700 (8th Cir. 1986); *Federal Crop Ins.*, 765 F.2d at 728.

Agent Ouseley testified that he had been an FBI agent for twenty-five years, had attended training schools, and had previously testified twelve times as an expert on the use of codes. In these circumstances, the district court did not abuse its discretion in allowing Ouseley to testify as an expert.

LaPietra's argument that the evidence did not support

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[13] LaPietra also asserts that the identification is based entirely on co-conspirator hearsay statements and that he is shown to be a member of the conspiracy through these same hearsay statements. As noted above, the trial court may consider hearsay statements in making preliminary determinations concerning admissibility of evidence. *Bourjaily*, 107 S. Ct. at 2780. Accordingly, LaPietra's argument in this regard is without merit.

Ouseley's conclusion that Pitsacuni was LaPietra's code name speaks to the weight of Ouseley's opinion, not its admissibility. He was thoroughly cross-examined about the evidence upon which he based his opinion. Furthermore, the district court instructed the jury that expert testimony should be considered just like any other testimony and be given whatever weight the jury finds appropriate in light of the expert's qualifications and all the other evidence. Accordingly, we reject LaPietra's claim.

N. Sufficiency of Travel Act Indictment

Appellant Lombardo alleges that the substantive counts of the Travel Act in the indictment fail to specify the particular acts that the defendants did in furtherance of illegal activity.

We reject Lombardo's contention. Generally, an indictment is sufficient if it sets forth the offense in the statutory language, provided that the statute sets out the necessary elements of the offense. *United States v. McKnight*, 799 F.2d 443, 445 (8th Cir. 1986). Nonetheless, the defendant is entitled to a short, concise statement of facts constituting the offense charged, but he is not entitled to know the evidentiary details with which the government intends to convict him. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986); *McKnight*, 799 F.2d at 445. In the present case, the indictments contained lengthy statements of fact, and Lombardo clearly cannot claim inadequate notice of the acts with which he was charged. *See supra*, noted 6-7.

O. District Court's Admonition to Lombardo's Attorney

Lombardo argues that he was unfairly prejudiced by the district court's admonition to his attorney, Mr. Oliver, in the presence of the jury. During cross-examination, FBI agent Palmer testified that he had observed Lombardo driving a red and white vehicle and that he learned the car was registered to Lombardo. Mr. Oliver then asked

Palmer "would it surprise you to learn [Lombardo] had never owned a red and white car?" The court then asked Mr. Oliver if he, as an officer of the court, could prove his statement because no evidence of Lombardo's lack of ownership had been entered on the record. The court informed Mr. Oliver that if he could not prove his representation, he would be disbarred and held in contempt. Lombardo contends that this exchange prejudiced him and affected the jury's verdict.

We do not agree. At the next court session, the court gave the jury a curative instruction, stating that the defendant was presumed innocent, was not required to produce evidence, and that the Government carried the burden of proof. The court's instruction served to correct any misunderstanding the jury may have had from the court's prior admonition to Mr. Oliver. Furthermore, the fact in issue, ownership and/or color of Lombardo's car, was not a critical issue. Although the admonition should not have been made in the presence of the jury, these remarks by the court cannot be deemed prejudicial error.

P. Appellant Rockman's Claims[14]

Rockman argues that the district court erred when it ruled on the admissibility of co-conspirator hearsay statements at the close of the Government's case and not at the end of all the evidence. Thus, he contends, statements and acts that occurred after the conspiracy had ended were erroneously admitted.

Rockman's argument alleges that the district court failed to follow the procedures mandated by *United States*

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[14] We address Rockman's claims as presented in his substituted supplemental brief. His original brief raised different issues which, although we do not discuss, lack merit. Although this substituted brief raises new issues after the initial briefing, we permitted its filing because of the extraordinary circumstances causing counsel's substitution and in the interest of fairness.

v. Bell, 573 F.2d 1040 (8th Cir. 1978). He contends that because *Bell* requires the court to rule on the admissibility of co-conspirator hearsay statements at the close of all the evidence, the district court prejudiced his ability to present his defense when it made its ruling at the close of the Government's case. Rockman contends that the court's premature ruling caused it to exclude testimony of Shannon Bybee, a Government witness, who was called by Rockman to testify that Glick had no gaming interests after 1979. Rockman argues that this evidence was crucial because the indictment charge that the illegal objective of the conspiracy was to maintain a hidden interest in the gaming interests of Allen Glick. Because Blick held no gaming interests after 1979, the district court erred in admitting co-conspirator acts and statements that occurred after 1979.

Initially, we note that it is not per se reversible error for the district court to make *Bell* findings at the close of the Government's case. *United States v. Legato*, 682 F.2d 180, 183 (8th Cir.), *cert. denied*, 459 U.S. 1091 (1982). Rather, we must determine whther Rockman suffered any prejudice from the court's action. *Id.*

Rockman contends that he was prejudiced because he could not establish that the conspiracy ended in 1979 and thus prove subsequent statements inadmissible. Although we are troubled by the district court's exclusion of Mr. Bybee's testimony on Rockman's behalf, we cannot say that the court's action rises to reversible error. In essence, Rockman is alleging prejudice because the evidence varied impermissibly from the indictment. The indictment charged that the conspiracy lasted until 1983. Rockman argues that because the illegal objective was a hidden interest in Glick's gaming interests, the conspiracy ended in 1979 with Glick's sale of his casinos.

As a variance agrument, Rockman's challenge is without merit. He had ample and obvious notice that the Government was attempting to prove a conspiracy that

endured until 1983. Furthermore, the jury knew of Glick's 1979 sale. The court also instructed the jury that co-conspirator statements made after the end of the conspiracy could be considered only against the person making them. Accordingly, the court did not commit reversible error in this regard.

II. CONCLUSION

For the reasons stated above, we affirm the convictions.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(3)

No. 87-1746

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE SOUTHLAND CORPORATION, RAY BERRY, TAL COLSON, KEITH JENKINS, ROBERT DUNCAN, JOHN P. THOMPSON, JERE W. THOMPSON, WALTON GRAYSON III, JOSEPH S. HARDIN, R.G. SMITH, EUGENE PENDER, S.R. DOLE, and TERRY DE BARD,
Petitioners,

v.

RICHARD D. and DARLA J. KEATING, MICHAEL M. AND GLORIA G. COY, and HARRY BATTERSBY on behalf of themselves and all other persons similarly situated,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 1988

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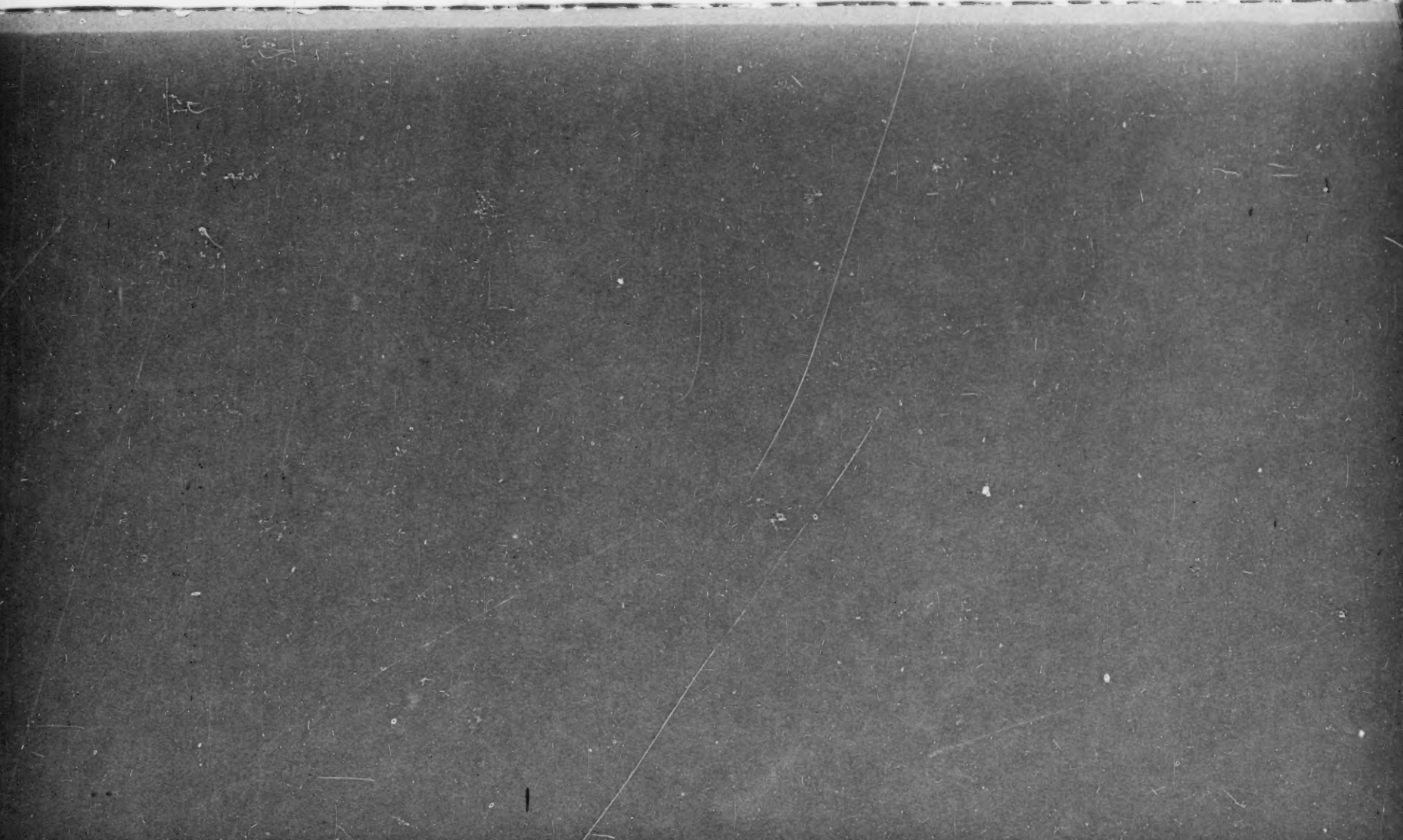

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No. 87-1746

In the Supreme Court

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THE SOUTHLAND CORPORATION, et al.,

Petitioners,

v.

RICHARD D. KEATING, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, CALIFORNIA

I.

INTRODUCTION

Southland's petition for certiorari completely distorts the posture of the case. The California courts have not "acted contrary to this Court's mandate" (Petition, p. 1), nor have respondents "contradicted what they had represented to this Court" (Petition, p. 7), engaged in a "ruse" (Petition, p. 12), or attempted to manipulate the Court's procedures (Petition, p. 9). Briefly stated, this is what happened:

On the first appeal, the parties were asked by the clerk of the state court of appeal what law, state or federal, should govern the issue of whether there can be classwide arbitration. Southland responded that California law applied. Southland did not claim in either that court or in the California Supreme Court that classwide arbitration was barred by the Federal Arbitration Act.

Southland raised that issue for the first time on certiorari to this Court, which refused to hear it on the ground that it had not been raised in or decided by the California courts.[1] The case was remanded "for further proceedings not inconsistent" with this Court's opinion. *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

On remand, the superior court refused to reconsider the propriety of class arbitration as a federal issue instead of a state issue, on the grounds that, under California law, Southland raised the argument too late. The decision of the California Supreme Court on the first appeal was now the law of the case. Under California law, that doctrine applies not only to matters actually considered and decided on a prior appeal, but to any matter essential to the decision and in that sense "impliedly" decided. Having deliberately chosen to rely solely on state law on the first appeal, Southland was held barred on remand from recharacterizing the issue as one of federal law. Applying California law as enunciated by the California Supreme Court in its opinion on the first appeal, the superior court ordered classwide arbitration. Southland's appeal from that decision was dismissed because the order, being interlocutory, is nonappealable, and Southland's application for a

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[1] This Court's decision expressly recognized that: . . . . Southland did not contend in the California courts that, and the state courts did not decide whether, state law imposing of class-action procedures was preempted by federal law. When the California Court of Appeal directed Southland to address the question whether state or federal law controlled the class-action issue, Southland responded that *state law* did not permit arbitrations to proceed as class actions, that the Federal Rules of Civil Procedure were inapplicable, and that requiring arbitrations to proceed as class actions 'could well violate the [federal] constitutional guaranty of procedural due process.' Southland did not claim in the Court of Appeal that if state law required class-action procedures, it would conflict with the federal Act and thus violate the Supremacy Clause.

Southland Corp. v. Keating, 465 U.S. 1, 8 (1984).

In the California Supreme Court, Southland likewise argued that California law applied and did not oppose class certification on federal grounds. *Ibid.*

writ was denied. The California Supreme Court declined discretionary review.

In that posture, Southland once again seeks review of the same federal question that this Court refused to hear the first time. It is elementary that in order to maintain jurisdiction in this Court on the ground that a state court has denied a federal right, it is necessary to satisfy the requirements of state procedure for presenting the federal question in a timely and proper fashion. Ordinarily, the federal issue is presented too late in the state courts if it is raised for the first time on appeal. A fortiori, it is too late when raised for the first time on remand to the trial court following appeal.

II

ARGUMENT

A. There Is No Jurisdictional Basis for the United States Supreme Court to Review the Order

Southland's petition for certiorari attempts to present the issue whether California's classwide arbitration procedure is preempted by the Federal Arbitration Act. There are two reasons why that issue may not be considered at this juncture: (1) the California Superior Court did not decide the purported federal issue posed by Southland but based its order upon adequate and independent state grounds, and (2) the order is not final for purposes of United States Supreme Court review.

1. The California Superior Court Did Not Reach The Federal Issue Posed by Southland, But Rested Its Decision Upon Adequate and Independent State Grounds

In its statement of decision issued with its order, the superior court held as follows:

> Southland has argued to this court that the permissibility of class arbitration is governed by the Federal Arbitration Act. The court declines to consider this argument because the doctrines of invited error and law of the case preclude Southland from raising such argument at this point in these

proceedings. This court has therefor determined the propriety of class arbitration under state law.

It is a fundamental rule that this Court will not review state court judgments that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125, 89 L.Ed. 789, 794, 65 S.Ct. 459 (1944); see 12 Moore's Federal Practice, ¶ 511.01, pp. 8-65—8-66 (2d ed. 1982), and cases there cited. In order to maintain jurisdiction on the ground that a state court has denied a federal right, it is necessary to satisfy the requirements of state procedure for presenting the federal question at the right time and in the right way. "[W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582, 22 L.Ed. 2d 572, 579, 89 S.Ct. 1354 (1969).

Ordinarily the federal issue is presented too late if it is raised for the first time on appeal. *Bailey v. Anderson*, 326 U.S. 203, 205-207, 90 L.Ed. 3, 66 S.Ct. 66, 68 (1945); *Memphis Nat. Gas Co. v. Beeler*, 315 U.S. 649, 650-651, 86 L.Ed. 1090, 62 S.Ct. 857, 859-860 (1942); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 47 L.Ed. 480, 23 S.Ct. 375 (1903); see discussion in Wright, Miller, Cooper & Grossman, Federal Practice and Procedure: Jurisdiction § 4022, pp. 701-703. This is an fortiori case because Southland raised the federal preemption issue in the California courts for the first time on remand *after* the first appeal. At that time it was clearly too late.

An almost identical situation was presented in *Northern Pacific R. Co. v. Ellis*, 144 U.S. 458, 36 L.Ed. 504, 12 S.Ct. 724 (1891). In that case, plaintiff Ellis had sued the railroad in Wisconsin state court to quiet title to a parcel of real estate on the basis that a deed from the county to the railroad was void as an ultra vires gift. The Supreme Court of Wisconsin affirmed a judgment for plaintiff. On remand for further proceedings in the trial court, the railroad sought to rely as a defense upon a recent decision of a federal court on the same issue between the same parties, but affecting a different parcel of land. Relying on federal law, that court had found that a similar deed from the county to the

railroad was valid. *Roberts v. Northern Pacific R. Co.*, 158 U.S. 1, 39 L.Ed. 873 15 S.Ct. 756 (1894). The Wisconsin trial court refused to consider that federal issue, and entered judgment in favor of Ellis. The railroad company again appealed to the Wisconsin Supreme Court, which affirmed on the ground that its prior decision (in which the federal issue had not been raised) was now the law of the case. The railroad petitioned the Supreme Court of the United States for a writ of error. The Supreme Court dismissed the writ. Chief Justice Fuller wrote:

> the decision of the Supreme Court of Wisconsin rested upon an independent ground not involving a federal question and broad enough to maintain the judgment. [Citation.]
>
> The Supreme Court held that by reason of its decision [on the first appeal] . . . , the rights of the parties were *res adjudicata*, and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down, and it had no power upon a second appeal to review that judgment. . . . Under these circumstances the judgment of the [Wisconsin] Supreme Court is not subject to review here.
>
> . . . The judgment before us was rendered in accordance with well settled principles of general law, not involving any Federal question, ...

144 U.S. at 464-465.

The only difference between that situation and the case at hand is that here there was a petition to the United States Supreme Court after the first appeal as well as after the second. In other respects, the posture of the cases appears to be identical. The Supreme Court will not consider a federal issue which the state courts have never considered because of their own application of the doctrine of the law of the case. This limitation on Supreme Court review is clearly applicable here.

2. Southland Is Prohibited by California Law From Changing Its Position From That Taken in the First Appeal

Southland argues that the federal question was properly raised, and that the superior court erred in its application of the law of the case doctrine.[2] This argument is premised upon the assertion that plaintiffs have changed their position from contending, when the case was previously before this Court, that the California courts did *not* decide the federal preemption issue to now contending, under the law of the case doctrine, that it *was* decided. Petition, pp. 11-14. This is a fallacious argument based upon a distortion of what occurred and a misrepresentation of plaintiffs' position.

Plaintiffs have never contended that the California courts in fact decided the federal preemption issue during the first appeal. The California courts clearly did not consider the question for the reason that Southland never raised it and, when asked, advised the California courts that state law prevented classwide arbitration and that the Federal Rules of Civil Procedure did not apply. *Southland Corp. v. Keating, supra,* 465 U.S. at 8; footnote 1, *supra.*

What plaintiffs *have* said is that the California law of the case doctrine applies not only to questions expressly decided on a prior appeal, but to those that were essential to the decision and in that sense "impliedly" decided. See plaintiffs' Reply to Defendant's Opposition to Motion for Class Certification, August 22, 1986, p. 4, citing *Estate of Horman,* 5 Cal. 3d 62, 73, 95 Cal. Rptr. 433, 443, 485 P.2d 735 (1971). There is no inconsistency between the indisputable proposition that the California courts did not decide the federal preemption issue on the first round of appeals (because it was not raised) and the contention that the law of the case doctrine now bars Southland from raising the issue because it was essential to the California Supreme Court's first decision.

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[2] Whether this is so is, of course, a question of state law which has yet to be addressed by the California appellate courts.

The California Supreme Court held on the first appeal that, provided certain criteria were met, arbitration proceedings could be conducted in this case on a classwide basis. *Keating v. Superior Court*, 31 Cal. 3d 584, 613-614 (1982). It was essential to that holding that classwide arbitration was not somehow barred by federal law. The law of the case doctrine under California law applies to matters which were essential to the decision even though not raised. *Gore v. Bingaman*, 20 Cal. 2d 118, 124 P.2d 17 (1942); *Davis v. Edmonds*, 218 Cal. 355, 23 P.2d 289 (1933); *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.*, 217 Cal. App. 2d 799, 804-805 (1963); see cases collected at 9 Witkin, Cal. Procedure, Appeal, § 754, p. 722 (3d ed. 1985).[3] The superior court therefore was correct in ruling that the doctrine bars Southland from raising a federal preemption issue that it had the opportunity to raise, but did not raise, on the previous appeal.[4]

California unquestionably has a legitimate interest in applying its law of the case doctrine. The doctrine has also generally been followed in the federal courts, where it is thought to serve "the dual pupose of: (1) protecting against the agitation of settled

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[3] Southland's exposition of California law at page 12 of its Petition is superficial. While it is the *general rule* that the law of the case doctrine does not extend to matters which might have been but were not presented and determined on a prior appeal (9 Witkin, Cal. Procedure, Appeal, § 753, p. 721 (3d ed. 1985)), that general rule is subject to an important exception where the particular point was *essential to the decision*. *Id.*, § 754, p. 722. The *Gore*, *Davis* and *Nevcal* cases cited in the text above are cases applying that exception. Southland relies on the general rule without even mentioning the exception, or attempting to distinguish those cases, although plaintiffs have relied upon the exception at each stage of these proceedings.

[4] The superior court in this case based its refusal to consider the federal preemption issue on the doctrines of law of the case and invited error. It was probably also justified on the basis that Southland's conduct in the state court of appeal during the first appeal constituted a waiver of any claim that the Federal Arbitration Act prevented classwide arbitration. See, e.g., *Davis v. Edmonds*, *supra*, 218 Cal. 355, 358, and *Henry v. Mississippi*, 379 U.S. 443, 450, 13 L.Ed. 2d 408, 414, 85 S.Ct. 564 (1965).

issues; and (2) assuring the obedience of inferior courts to decisions of superior courts." 1B Moore's Federal Practice ¶ 0.404[1], pp. 117-120 (2d ed. 1984), and cases there cited. As in the California courts, the federal law of the case doctrine prohibits a party who omits argument on a point of law necessarily involved in the disposition of an appeal from presenting it on a second appeal. *Ibid*, ¶ 0.404[1], p. 120, n. 15. As this Court observed long ago, "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation." *Roberts v. Cooper*, 61 U.S. 467, 15 L.Ed. 969, 973-974, 20 How. 467, 481 (1858).

The same point has been made more recently by a California appellate court in applying the law of the case doctrine:

> Furthermore, it is of no consequence that the point in question was not raised by counsel on the prior appeal or expressly mentioned. [Citations] . . . [I]t becomes immaterial that the lower court upon the first trial did not choose to determine the precise legal issue. The controlling factor here is that the reviewing court did so choose—impliedly at the very least, if not expressly—in order to reach the result which it did.

NevCal Enterprises v. Cal-Neva Lodge, Inc., supra, 217 Cal. App. 2d at 805.

There is thus no inconsistency between plaintiffs' representation to this Court on the first appeal that the California courts did not consider the federal preemption issue and their position that the law of the case doctrine bars Southland from raising it now. After inviting the California courts to treat the class arbitration issue as one of state procedure and then losing on that issue, Southland may not now claim that the issue should have been decided under federal law. It is Southland, not plaintiffs, that has done "a 180 degree turn" (Petition, p. 11) and seeks to "have it both ways (Petition, p. 13)."[5]

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[5] Southland makes several other specious arguments as to why the law of the case doctrine does not apply or is not a bar to review by this Court.

3. The Order Is Not Final for Purposes of United States Supreme Court Review

Under 28 U.S.C. § 1257, this Court has jurisdiction to review only final judgments or decrees rendered by the highest court of a state in which a decision can be had.[6] The finality requirement normally is not satisfied if the state courts still must conduct further substantive proceedings before the parties' rights as to federal issues are resolved, and this Court ordinarily has no jurisdiction to review an interlocutory judgment. *Pennsylvania v.*

First, Southland asserts that the doctrine is merely a "discretionary rule" in California rather than a jurisdictional requirement. Petition, p. 13, n. 11. The California Supreme Court has made it clear, however, that state appellate courts are not free to disregard a prior appellate determination in the case unless it is at least demonstrated that such would result in a "manifest misapplication of existing principles resulting in substantial injustice." *People v. Shuey*, 13 Cal. 3d 835, 846, 120 Cal. Rptr. 83, 533 P.2d 211 (1975). Southland also suggests that the doctrine is not to be applied to "pure questions of law." Petition, p. 13. However, principles of law are exactly what the law of the case doctrine does apply to. *Tally v. Ganahl*, 151 Cal. 418, 421, 90 P. 1049 (1907). See 9 Witkin, Cal. Procedure, Appeal, § 737, pp. 705-706 (3d ed. 1985). Finally, Southland says that the doctrine is inapplicable here because intervening cases have changed or significantly clarified tha law. Petition, p. 13, n. 12. However, the California Supreme Court's decision in this case on the permissibility of classwide arbitration has not been changed or clarified; to the contrary (as Southland itself acknowledges in its Petition), the prior decision has been followed and applied by the California appellate courts. *Izzy v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315 (1986); *Gainey v. Occidental Land Research*, 186 Cal. App. 3d 1051, 231 Cal. Rptr. 249 (1986); *Lewis v. Prudential-Bache Securities*, 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986).

[6] Contrary to Southland's assertion at page 9 of its Petition, respondents do not contend that the Court lacks jurisdiction merely because the order at issue was entered by a trial court. Rather, respondents contend that this Court lacks jurisdiction because the order was interlocutory, and because the California appellate courts, having declined to review it for that reason, will have an opportunity to do so upon the appeal that Southland will have the right to take from a judgment confirming an arbitration award.

Ritchie, 480 U.S. ____, 94 L.Ed. 2d 40, 51, 108 S.Ct. ____ (1987).

As Southland acknowledges, the court of appeal granted plaintiffs' motion to dismiss Southland's appeal after plaintiffs pointed out that orders directing parties to arbitrate are interlocutory and nonappealable. See 9 Witkin, Cal. Procedure, Appeal, § 71, p. 95 (3d ed. 1985), and cases there cited. Under California law, such orders are reviewable on appeal from a judgment confirming the arbitration award. *Id.*; see Cal. Code Civ. Proc. §§ 1294, 1294.2. On such an appeal, Southland would be entitled to challenge the superior court's application of the law of the case and invited error doctrines and, should it agree with Southland's position on these state law issues, the California Court of Appeal presumably would then consider the federal issue whether classwide arbitration is preempted by federal law.[7] Only such a decision would be final for purposes of 28 U.S.C. § 1257. This Court lacks jurisdiction—not because the state appellate courts declined to review the order at this juncture—but because under state procedure Southland has a remaining appeal as of right.[8]

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[7] California Code of Civil Procedure, section 1294.2—which governs appeals from judgments confirming arbitration awards—provides in part: "Upon an appeal from any order or judgment under this title, the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party."

[8] The cases cited by Southland at page 10 of its Petition are not inconsistent with this proposition. In *Perry v. Thomas*, 107 S.Ct. 2520, 96 L.Ed. 2d 426 (1987), this Court reviewed a California Court of Appeal's decision affirming a superior court order *denying* a petition to compel arbitration. Unlike orders directing parties to arbitrate, orders denying petitions to compel arbitration *are* appealable in California. 9 Witkin, Cal. Procedure, Appeal, § 72, p. 96 (3d ed. 1985), and authorities there cited. Thus, once the California Supreme Court denied discretionary review, the court of appeal's decision in *Perry* was the decision of the highest state court in which a decision could be had. There is no indication in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), that the petitioner had a remaining appeal as of right to the state courts.

Southland to the contrary, this case does not come within the exception described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, at pages 482-485, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975).[9] That exception applies to situations in which a state court has written an opinion denying a federal right or claim, which opinion would otherwise remain on the books as precedent unless immediately reviewed by the United States Supreme Court, thus eroding federal policy. *Id.* at 485. There is no such decision here. The California courts have decided a procedural issue—the propriety of classwide arbitration—under state law. The California courts have not addressed the contention that the Federal Arbitration Act prohibits classwide arbitration. That contention has not been considered because under state law Southland is estopped to raise it. There is no precedent on the merits of the issue which could "erode federal policy" and thus no basis for an exception to the general rule that interlocutory judgments are not reviewable by this Court.

B. The Question Does Not Merit Review by This Court

The California courts have not addressed the federal question which Southland seeks to raise. Accordingly, this case does not present any federal question at all. But even if the issue Southland seeks to raise were present, it would not be a substantial issue. Southland's argument—that classwide arbitration is strictly prohibited by the Federal Arbitration Act—is not based on any language in that Act nor upon any federal case that has considered the point. Rather, it is a variant of the same argument that Southland has made all along, namely, that there is something

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Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), involved a prior restraint on free speech, and first amendment rights would have been irretrievably lost if the court had declined to review the ruling of the highest Illinois court on the temporary injunction.

[9] The *Cox* case describes four categories of cases in which the Supreme Court will review state court decisions on federal questions even though further state court proceedings are pending. None of the four is applicable here because each is predicated on there having been a final determination of the federal issue by the state court. 420 U.S. 469, 477. That initial predicate is lacking here because the California courts in this case have thus far declined to decide the federal issue.

fundamentally inconsistent between class action procedure and arbitration, that like fire and water, they cannot coexist. The California Supreme Court rejected that argument when it was presented as a question of state law on the first appeal. *Keating v. Southland Corp.*, 31 Cal.3d 584 (1982). The argument is no more persuasive when premised on the Federal Arbitration Act than on California law. The California statute and policy is as pro-arbitration as is the federal statute and policy.[10]

There is no basis for this Court to declare that class action procedure and arbitration are inherently irreconcilable in their goals or implementation. Class actions are considered important by both the federal and California courts.[11] Class actions serve an important function in our system of civil justice by allowing vindication of small claims which might otherwise go unprosecuted because the result would be consumed by the cost. *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 99 (1981). Class actions involving such claims are of special concern to state courts since only those individual claims exceeding $10,000 are within federal diversity jurisdiction. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Southland's interpretation of the Federal Arbitration Act would eliminate the class action device as a procedure for resolving claims encompassed within standardized contracts containing an arbitration clause. This would have far reaching effects. Any corporation in interstate commerce could insulate itself from liability for classwide wrongs simply by including an arbitration clause in all of its contract forms. We do not believe that the

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[10] The California statute is set forth at California Code of Civil Procedure, sections 1280 et. seq. See also *Morris v. Zuckerman*, 257 Cal. App. 2d 91, 95 (1967) [The arbitration statute "reflect[s] the strong legislative policy favoring arbitration"]; *Sanserino v. Shamberger*, 245 Cal. App. 2d 630, 635 ["Since arbitration is favored . . . every intendment will be indulged to give effect to such proceedings"].

[11] *Gen. Tel. of Southwest v. Falcon*, 457 U.S. 147, 72 L.Ed. 2d 740, 102 S.Ct. 2364 (1982); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551 (1974); *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 469, 174 Cal. Rptr. 515, 629, P.2d 23, 27 (1981).

Federal Arbitration Act was ever intended to be used by parties of superior bargaining power to achieve such an unjust result. There is nothing in the nature or purpose of the Act to prevent a state, in managing its own dockets and procedures, from neutralizing such an unfair tactic.

CONCLUSION

For the reasons stated above, Southland's Petition should be denied.

Respectfully submitted,

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